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APR 11 1996

U.S. DEPARTMENT OF JUSTICE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

April 11, 1996

**VIA HAND DELIVERY**

Mr. William Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Washington, D.C. 20554

**Re: CS Docket No. 96-46: Implementation of Section 302 of the  
Telecommunications Act of 1996 -- Open Video Systems**

Dear Mr. Caton:

Enclosed please find a copy of the Reply Comments of Adelphia Communications Corporation and Suburban Cable TV Co. Inc. in the above-referenced proceeding. In addition, pursuant to paragraph 94 of the Commission's Notice of Proposed Rulemaking, enclosed is a copy of the comments on diskette.

If there are any questions regarding this matter, please communicate directly with the undersigned.

Very truly yours,

  
Matthew D. Emmer

Enclosure

cc: ITS  
Larry Walke

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BEFORE THE

**Federal Communications Commission** RECEIVED

WASHINGTON, D.C. 20554

APR 11 1996

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )

Implementation of Section 302 of )  
the Telecommunications Act of 1996 )

Open Video Systems )

CS Docket No. 96-46

To: The Commission

**REPLY COMMENTS**

**ADELPHIA COMMUNICATIONS CORPORATION  
SUBURBAN CABLE TV CO. INC.**

**FLEISCHMAN AND WALSH, L.L.P.  
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Their Attorneys

Dated: April 11, 1996

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## **SUMMARY**

The Commission's Report and Order and Notice of Proposed Rulemaking ("Notice") in this proceeding seeks comment in implementing the Telecommunications Act of 1996's (the "Act") provisions regarding "open video systems" ("OVS"). On several issues addressed in their comments, Bell Atlantic et al. and by US West (collectively, the "Telcos") take anticompetitive positions, clearly at odds with the Act. The Act contains certain fundamental requirements regarding OVS, which the Commission may not violate.

First and foremost, OVS must be truly "open." The Act prohibits discrimination in the price, terms and conditions of access by programmers. Likewise, OVS operators or their affiliates may not select more than one-third of channel capacity where demand for capacity exceeds supply. The Telcos seek to undermine these requirements by denying access to programmers (especially cable operators) of their choosing. The Telcos also seek to establish the one-third capacity limit as a floor rather than a ceiling. Additionally, they want a guarantee that their affiliates will never be allocated fewer channels than any unaffiliated programmer, while simultaneously adopting positions that will reduce channel capacity for their competitors.

In fact, nothing in the Act prohibits the FCC from reducing the capacity allocated to OVS operators and their affiliates as demand for increases, in order to apportion such capacity equitably among all programmers. The Commission should require such reductions in capacity, unless the OVS operator expands capacity to accommodate all programmers. Otherwise, the OVS operator has the incentive to minimize capacity, allocate an ever-decreasing number of channels to a growing group of programmers, and thereby keep the lion's share of channels for itself.

The Act also prohibits the blatant discrimination proposed by the Telcos regarding safeguards governing OVS operation. The Telcos want no restrictions on joint marketing, no cost allocation requirements, no separate subsidiary requirements, and no other safeguards against anticompetitive conduct, especially cross-subsidization. The Telcos' proposals would put them in the position of the fox guarding the henhouse, as both unfettered gatekeeper of the facility and competitor to unaffiliated programmers. Under their suggested framework, they would be no more than unregulated cable operators, contrary to Congress' intent.

Accordingly, the Commission is bound by the letter and spirit of the statute to create a regulatory framework that is not so tilted in the telephone companies' favor as to undermine fair competition and open access. Likewise, the Commission must swiftly adopt meaningful safeguards, including its promised separate cost allocation proceeding, to deter anticompetitive conduct.

BEFORE THE  
**Federal Communications Commission**

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 302 of	)	CS Docket No. 96-46
the Telecommunications Act of 1996	)	
	)	
Open Video Systems	)	

To: The Commission

**REPLY COMMENTS**

Adelphia Communications Corporation and Suburban Cable TV Co. Inc. (collectively, the "Commenters"), by their attorneys, respectfully submit these Reply Comments in response to the Commission's Report and Order and Notice of Proposed Rulemaking ("Notice") in the above-referenced proceeding. The Notice seeks to implement the provisions of the Telecommunications Act of 1996 (the "Act") regarding "open video systems" ("OVS"). The Commenters operate cable systems throughout the Middle Atlantic and Eastern United States. The Commenters herein primarily reply to the Comments filed by Bell Atlantic et al.,<sup>1/</sup> and by US West, Inc. ("US West") (collectively, the "Telcos"). On several issues, the Telcos have taken anticompetitive positions clearly at odds with the Act.

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<sup>1/</sup>Comments of Bell Atlantic Telephone Companies and Bell Atlantic Video Services Company; BellSouth Corporation and BellSouth Telecommunications, Inc.; GTE Service Corporation and its affiliated domestic telephone operating companies and GTE Media Ventures, Inc.; Lincoln Telephone and Telegraph Company; Pacific Bell; SBC Communications Inc. and Southwestern Bell Telephone Company (hereinafter, the "Bells"), filed April 1, 1996 (hereinafter "Bell Comments").

**I. THE ONE-THIRD CHANNEL CAPACITY LIMIT IS A MAXIMUM, NOT A MINIMUM REQUIREMENT**

According to the Bells, "Congress intended that open video system operators be restricted to selecting the programming on no less than one-third of the activated channels if demand exceeds capacity."<sup>2/</sup> This statement is incorrect. Section 653(b)(1)(B) of the Act requires the Commission to prescribe regulations that

if demand exceeds the channel capacity of the open video system, prohibit an operator of an open video system and its affiliates from selecting the video programming services for carriage on more than one-third of the activated channel capacity on such system, but nothing in this subparagraph shall be construed to limit the number of channels that the carrier and its affiliates may offer to provide directly to subscribers.<sup>3/</sup>

Thus, the statute limits OVS operators to a maximum of one third of channel capacity where channel demand exceeds supply. The statute does not require the Commission to permit OVS operators to occupy one-third of channel capacity in all cases. Nor does the statute prohibit the Commission from reducing the OVS operator's capacity to less than one-third as demand increases.<sup>4/</sup>

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<sup>2/</sup>Bell Comments at 18.

<sup>3/</sup>47 U.S.C. § 573(b)(1)(B).

<sup>4/</sup>The Commenters agree with the Bells that OVS operators are not limited to one-third of capacity if demand is insufficient to fill existing capacity, but do not agree that the operators are similarly unlimited where demand is insufficient to fill "anticipated" capacity. See Bell Comments at 18. If demand currently exceeds capacity, the OVS operator should not be able to merely state that it "anticipates" expanding such capacity some years down the road in order to exceed or maintain its one-third channel occupancy, where other programmers will be allocated less capacity.

**A. The Bells' Proposals Would Destroy Incentives to Expand OVS Capacity.**

If the Bells' position is adopted, i.e., that no matter how many programmers seek capacity, the affiliated programmer keeps its one-third channel allotment, OVS operators will have no incentives either to build sufficient capacity to meet initial unaffiliated demand, or to expand capacity to meet increased demand. In fact, under the Bells' suggested framework, the OVS operator has the incentive not to add capacity, since under such framework each added unaffiliated purchaser will reduce capacity for each unaffiliated entity, but not for the affiliated purchaser. Obviously, such a result is anticompetitive and contrary to Congressional intent. The solution to this problem is simple: the Commission must provide that the capacity apportioned to the affiliate will be reduced below one-third as demand increases above capacity, unless and until the operator expands the capacity of the OVS.

**B. Under the Telcos' Proposals, the "Fox Would Guard the Henhouse."**

The Bells also argue that, in all cases, OVS operators should be permitted to control the programming on at least as many channels as the unaffiliated video programming provider.<sup>5/</sup> The Commenters agree that, where demand does not exceed supply, the OVS operator's affiliate could potentially select the programming on well over one-third of the channels. For example, on an OVS facility with 100 activated channels, one affiliated programmer, and one unaffiliated programmer, where the unaffiliated programmer seeks to utilize 40 channels, the OVS operator's affiliate may select the programming on the remaining 60 channels, since demand does not exceed supply. However, two examples

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<sup>5/</sup>Bell Comments at 18.

demonstrate that, in most other cases, the positions taken by the Telcos are unfair, anticompetitive, and contrary to Congressional intent:

**Example 1:** 100 activated channel OVS facility, one affiliated programmer, one unaffiliated. The unaffiliated programmer seeks to utilize 60 channels. The Commenters agree that the affiliated programmer is not limited to one-third of capacity (33 channels), because to do so would let seven channels lie fallow. Rather, the affiliate may select the programming on the remaining 40 channels, at which point demand equals but does not exceed supply. The statute does not, however, allow the affiliate to select 50 channels, and reduce the unaffiliated programmer's capacity to 50 channels, as the Bells argue.

**Example 2:** 100 activated channel OVS facility, one affiliated programmer, four unaffiliated programmers. The unaffiliated programmers each seek to utilize 25 channels. The affiliated programmer should not be permitted to select the programming on 33 channels, leaving the remaining 67 channels to be divided by the four other programmers, as suggested by the Bells. Instead, the capacity should be apportioned equally, with each of the five programmers allowed to select 20 channels.

While the Telcos argue that the Commission should always permit channel allocation in favor of the affiliated programmer, the only fair way for the Commission to interpret the statute in the above examples is in favor of the unaffiliated programmer. The reason why is clear: because the OVS operator has control over both the construction of the original and additional capacity of the OVS facility. There is no requirement in the Commission's proposed rules that the OVS operator build sufficient capacity to meet demand or to add capacity as demand continues to grow. Therefore, in example 2 above, under the Bells' "mandated minimum capacity" proposal, the OVS operator can unfairly reduce the unaffiliated programmer's capacity merely by seeking more capacity for its affiliated programmer. The OVS operator cannot be left to manipulate channel capacity without restrictions, because it will always have the incentive and the ability to do so in its favor, at the expense of unaffiliated competitors.<sup>6/</sup>

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<sup>6/</sup>See Comments of the People of the State of California and the Public Utilities Commission of the State of California ("California PUC Comments") at 3-5.

**C. The Telcos' Positions Would Eliminate the "Open" Requirement of OVS.**

The Telcos' efforts to gain a favored regulatory position does not stop at seeking a minimum of one-third channel of capacity for their affiliates. They also want to count such capacity in ways that favor their affiliates. For example, the Telcos do not want the Commission to deduct PEG, shared, or must-carry channels from the total prior to calculating the operator's one-third maximum channel capacity.<sup>7/</sup> Moreover, while the Telcos argue that their affiliates' channel occupancy can never be reduced below one-third, they claim that occupancy by their unaffiliated programming competitors can be so reduced.<sup>8/</sup> They also want full freedom to assign channel positions to unaffiliated programming competitors, which includes the ability to do so in the manner least favorable to such competitors.<sup>9/</sup> Perhaps most egregiously, the Telcos desire the freedom to make the open video system available only for their own affiliates, and closed for others.<sup>10/</sup> The Telcos' position is best summed up by the Bells' statement that "[o]pen video systems will not succeed if operators are restrained by regulation . . . ."<sup>11/</sup>

The Telcos' suggestions, if adopted, would eliminate the "open" aspect of OVS, the key obligation that distinguishes OVS from a cable system in the Act, while rewarding OVS operators with reduced regulation, the key benefit that the Act bestows upon OVS. However, Congress clearly recognized that in the OVS context -- where the ability of

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<sup>7/</sup>Bell Comments at 17, n.30. See also, US West Comments at 16-17, 19.

<sup>8/</sup>Bell Comments at 18.

<sup>9/</sup>Id. at 20. See also, US West Comments at 14-16.

<sup>10/</sup>Bell Comments at 15; US West Comments at 12-13 (an OVS operator, utilizing its sole discretion, should be able to exclude cable operators from the use of channel capacity on its OVS facility).

<sup>11/</sup>Bell Comments at 11.

unaffiliated programmers to compete with the OVS operator and its affiliate is dependent on access to capacity controlled by the OVS operator -- fair competition cannot exist without regulation.<sup>12/</sup> To conclude otherwise would be to leave the veritable fox guarding the henhouse. Consequently, the Act contains a clear quid pro quo -- OVS operators are subject to relief from certain regulatory burdens only if they certify to the Commission that they comply with regulations adopted by the Commission to ensure that the OVS facility is truly open.<sup>13/</sup> First among such regulations is that the Commission "prohibit an operator of an open video system from discriminating among video programming providers with regard to carriage on its open video systems."<sup>14/</sup> The Telcos' proposals, including the suggestion that OVS operators should be permitted to deny carriage to prospective programmers, are clearly discriminatory and contrary to the Act. Likewise, given an OVS operator's unique position as both a gatekeeper of the facility and a program distributor seeking to dominate any unaffiliated distributors using OVS facilities, US West's claim that "no rules are necessary" to deter discrimination is simply unrealistic.<sup>15/</sup>

Of course, as the Commission notes, where OVS capacity grows to exceed demand and the affiliated programmer's capacity must therefore be reduced below one-third, there should be a transition period during which the capacity is reapportioned, so as to avoid disruption to viewers.<sup>16/</sup> For example, NCTA advocates a maximum one-year transition

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<sup>12/</sup>See Time Warner Cable Comments at 4.

<sup>13/</sup>See 47 U.S.C. § 573(a)(1).

<sup>14/</sup>Id. at § 573(b)(1)(A).

<sup>15/</sup>US West Comments at 4-5.

<sup>16/</sup>Notice at ¶ 25.

period in such cases.<sup>17/</sup> The Commenters believe that such a period is too long.

Considering that cable operators face a much shorter period of only 90 days to discontinue carriage of existing programming to make room for a new must-carry television broadcast station,<sup>18/</sup> a similar period should apply to reapportionment of OVS capacity.

## **II. THE COMMISSION MUST IMPOSE ADEQUATE SAFEGUARDS AGAINST ANTICOMPETITIVE BEHAVIOR**

The Notice requests comment as to various safeguards that should be imposed upon OVS operation. For example, the Commission asks whether it "can and should adopt regulations regarding the joint marketing" of bundled services, such as long distance and local telephone, video, and data transmission, by OVS operators.<sup>19/</sup> Likewise, the Commission seeks comment on establishing cost allocation procedures between regulated and unregulated services under Part 64 of its rules.<sup>20/</sup> Given that LECs are local exchange telephone service monopolists or near-monopolists in most markets, permitting them to also become OVS operators subject to streamlined regulation places them in a unique and powerful position, where they will be able to cross-subsidize their services absent adequate safeguards.<sup>21/</sup>

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<sup>17/</sup>NCTA Comments at 16.

<sup>18/</sup>47 C.F.R. § 76.64(f)(4).

<sup>19/</sup>Notice at ¶ 66.

<sup>20/</sup>Id. at ¶ 70.

<sup>21/</sup>See Time Warner Cable Comments at 5.

**A. Joint Marketing Must be Regulated.**

The Bells argue that they should be free to jointly market video programming and telephone services.<sup>22/</sup> However, "Congress directed that OVS operators should be prevented from using their marketing activities to discriminate against competitors."<sup>23/</sup> Moreover, LECs operating OVS facilities are in a unique position to market numerous services to residents, at a substantial discount.<sup>24/</sup> At minimum, therefore, until telephone service is fully competitive, a LEC representative who advises a customer or potential customer about additional services such as video or long distance should be required to mention alternative providers of such services such as the local cable operator.<sup>25/</sup> The Commission should monitor this procedure. Alternatively, OVS operators should be required to conduct inbound telemarketing or referrals of their video services on the same terms, conditions and prices to all video programming providers, and must provide the names, on a rotating basis, of video programmers and cable operators that request such a listing service.<sup>26/</sup>

**B. The Commission Must Take Swift, Concrete Steps Regarding Cost Allocation.**

The Telcos also argue that the Commission should not impose any conditions regarding cost allocation in the OVS certification process.<sup>27/</sup> However, since the Title II

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<sup>22/</sup>Bell Comments at 30.

<sup>23/</sup>TCI Comments at 9, citing 47 U.S.C. § 573(b)(1)(E).

<sup>24/</sup>See Time Warner Cable Comments at 17.

<sup>25/</sup>See NCTA Comments at 24-25.

<sup>26/</sup>TCI Comments at 10. The Commenters also endorse additional proposals put forth in this area, including outbound telemarketing restrictions. See id. at 10-11.

<sup>27/</sup>See Bell Comments at 31; US West Comments at 7-8.

safeguards normally available will not apply to OVS, there is even more need to establish cost allocation procedures under Part 64.<sup>28/</sup> Such procedures are necessary to ensure that regulated telecommunications service costs are segregated from the costs of unregulated services such as OVS, thereby rendering cross-subsidization more difficult. The Commenters thus agree with parties who stressed the need for the Commission to adopt cost allocation regulations before entertaining requests for OVS certification.<sup>29/</sup> As the Pennsylvania Public Utility Commission stated, "[r]eliance upon LEC provided ad hoc or ex post facto separations studies by state regulators obligated to regulate LEC rates and tariffs would both impose an intolerable burden, and create a likely risk of inter-jurisdictional separations disputes."<sup>30/</sup>

The Commission states that it will address cost allocation in a separate proceeding to be initiated "shortly."<sup>31/</sup> The Commenters join others, including US West, in supporting the Commission's efforts in this area,<sup>32/</sup> but urge the Commission to act swiftly and decisively to conclude such proceeding. Adelphia, in particular, urges the Commission not to repeat the process that took place regarding cost allocation for Bell Atlantic's video dialtone ("VDT") facility in Dover Township, New Jersey, where Adelphia operates a cable

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<sup>28/</sup>See General Services Administration ("GSA") Comments at 3-4.

<sup>29/</sup>See, e.g., NCTA Comments at 22; Pennsylvania PUC Comments at 8; California PUC Comments at 12.

<sup>30/</sup>Pennsylvania PUC Comments at 8.

<sup>31/</sup>Notice at n.82.

<sup>32/</sup>See, e.g., State of New York Dept. of Public Service Comments at 5, 8; US West Comments at 9-10; GSA Comments at 4.

system.<sup>33/</sup> The Telecommunications Act of 1996 repealed the Commission's VDT rules and policies, but grandfathered VDT operations, such as Bell Atlantic's Dover system, that had already been authorized.<sup>34/</sup> The Commission never resolved the VDT cost allocation issue. Accordingly, Bell Atlantic's VDT system is not subject to any cost allocation rules or oversight. Bell Atlantic is thus in a position to cross-subsidize its VDT service with local telephone ratepayer revenue.<sup>35/</sup> This situation must not be allowed to recur in the OVS context. The promise of a separate cost allocation proceeding must not be used to back burner or completely avoid crucial cost allocation issues.

**C. The Commission Should Require Separate Subsidiaries for BOCs and Tier I LECs.**

The Commenters also agree with NCTA and others that the Commission should require Bell Operating Companies and other incumbent Tier I LECs to offer video programming directly to subscribers over OVS through a structurally separate subsidiary.<sup>36/</sup> Otherwise, "the incumbent LEC has strong incentives to" cross-subsidize its OVS service by misallocating "costs associated with OVS to telephone services."<sup>37/</sup> As a result, the LEC could price its OVS service at an artificially low level, at which unaffiliated programmers could not compete, while simultaneously charging higher rates to its telephone

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<sup>33/</sup>New Jersey Bell Telephone Company, Order and Authorization, 9 FCC Rcd 3677 (1994).

<sup>34/</sup>Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) at § 302(b)(1).

<sup>35/</sup>See GSA Comments at 4-5.

<sup>36/</sup>See, e.g., NCTA Comments at 25; Time Warner Cable Comments at 10.

<sup>37/</sup>NCTA Comments at 26.

ratepayers.<sup>38/</sup> A separate subsidiary requirement is the only way to ensure that such cross-subsidization does not occur.<sup>39/</sup>

### **III. CONGRESS INTENDED TO PROMOTE COMPETITION AMONG ALL VIDEO DELIVERY SYSTEMS**

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#### **A. The Act Does Not Prohibit Any Party From Qualifying Either as an OVS Operator or Programmer.**

The Notice asks whether the Commission should allow cable operators to become OVS operators or provide programming using OVS capacity, and tentatively concludes that "there may be significant benefits to permitting cable operators and others to become open video system operators."<sup>40/</sup> The Act also authorizes cable operators to operate OVS facilities, consistent with the public interest.<sup>41/</sup> While the Telcos agree that cable operators should be able "to convert to open video systems,"<sup>42/</sup> the Telcos state that OVS operators should be able to refuse capacity to cable system operators and other multichannel video programming providers.<sup>43/</sup> These entities incorrectly seek to define these proceedings and the underlying statutory provision as a battle simply between themselves and incumbent cable operators, and then request numerous regulatory advantages over cable operators who remain significantly regulated under the Act. In so doing, the Telcos seek to eliminate the "open"

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<sup>38/</sup>NARUC Comments at 6. As NARUC states, adequate cost allocation procedures are also necessary to make such cross-subsidization more difficult.

<sup>39/</sup>See Time Warner Cable Comments at 10.

<sup>40/</sup>Notice at ¶ 64.

<sup>41/</sup>47 U.S.C. § 573(a)(1).

<sup>42/</sup>Bell Comments at 29; US West Comments at 2 ("a cable company should be permitted to operate an open video system.")

<sup>43/</sup>Bell Comments at 12, 15; US West comments at 12-13.

requirement of OVS, and offer what amounts to unregulated cable service. This is not what the Act intended. Rather, the Commission cited among Congress' goals "diversity of programming choices . . . and increased consumer choice."<sup>44/</sup> Furthermore, as previously explained, the Act clearly prohibits OVS operators from discriminating with regard to carriage of programmers.<sup>45/</sup> The Act thus intended truly "open" video systems, where all competitors have more options to compete, maximizing choices and reducing prices for consumers. The only way to achieve these goals is to ensure that the regulatory advantages accorded OVS operators and programmers are available to all parties, including cable operators.

Accordingly, under the Act, telephone companies may provide video programming as (i) franchised cable operators, (ii) OVS operators and/or programmers, (iii) wireless cable operators, or (iv) radio-based system operators.<sup>46/</sup> Thus, it is anticompetitive for the Telcos and US West to try to limit cable operators' options in providing video programming. Such a result would tilt the playing field even further in the telephone companies' favor. The Act does not prohibit cable operators from transforming their operations into an OVS facility or from utilizing capacity on their own or another's OVS facility. The Act's goals of increased programming and consumer choice will be furthered by giving consumers access to more programming and providers, including cable operators and their programming, over OVS facilities.

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<sup>44/</sup>Notice at ¶ 4, citing H.R. Conference Rep. No. 458, 104th Cong., 2nd Sess. (1996), Comments at 172, 177-178.

<sup>45/</sup>47 U.S.C. § 573(b)(1)(A).

<sup>46/</sup>Id. at § 571(a).

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**IV. CONCLUSION**

The Telcos argue for de facto unregulated cable operator status and other unfair advantages against OVS programmers with whom they will compete. The Commission must not permit the "fox to guard the henhouse" without clear limits and safeguards regarding OVS operator channel allocation and operation.

Respectfully submitted,

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Dated: April 11, 1996

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